ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	
Petition of the People of the State of California and the Public Utilities Commission of the State of California to Retain Regulatory Authority Over Intrastate Cellular Service Rates	PR Docket No. 94-105

COMMENTS OF AIRTOUCH COMMUNICATIONS ON THE DRAFT PROTECTIVE ORDER

AIRTOUCH COMMUNICATIONS
David A. Gross
Kathleen Q. Abernathy
1818 N Street, N.W.
Suite 800
Washington, D.C. 20036
(202) 293-3800

PILLSBURY MADISON & SUTRO
Mary B. Cranston
Megan Waters Pierson
P.O. Box 7880
San Francisco, CA 94120-7880
(415) 983-1000

Attorneys for AirTouch Communications

October 7, 1994

SUMMARY

AirTouch Communications submits that consideration of a protective order is premature. The FCC has not ruled on the motion of the Cellular Carriers Association of California to strike the confidential submission of the California Public Utilities Commission ("CPUC"). The FCC should rule on that motion prior to determining whether a protective order is appropriate. In fact, the cellular carriers are not in any position to assess whether a protective order will adequately safeguard their interests. The carriers have never been given notice of the exact contents of the information to be released to their direct competitors and thus cannot give their "informed consent" to any protective order.

Indeed, the imposition of a protective order will prejudice not only the cellular carriers, but the public as well. Most importantly, release of highly sensitive information to direct competitors is flatly at odds with the FCC's policy that disclosure of such information is anticompetitive. A protective order simply cannot guard adequately against the inadvertent use of such information in other contexts. Moreover, disclosure of the information to only certain parties would create two records in this proceeding and deny the public its right to comment, as required under the Communications Act.

The FCC simply cannot fashion a protective order that will preserve its policy against dissemination of sensitive competitive data while also allowing the public an opportunity to comment. The FCC need not risk the adverse consequences that may arise from disclosure of the information. There is a substantial record upon which the FCC can rely in rendering its decision. Accordingly, the FCC should strike the CPUC's improper confidential submission from the record.

TABLE OF CONTENTS

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	PR Docket No. 94-105
Petition of the People of the State of California and the Public Utilities Commission of the State of California to Retain Regulatory Authority Over Intrastate Cellular Service Rates	)	

COMMENTS OF AIRTOUCH COMMUNICATIONS ON THE DRAFT PROTECTIVE ORDER

Pursuant to the Federal Communications Commission's ("FCC's") Public Notice (DA 94-1083) issued on September 30, 1994, AirTouch Communications ("AirTouch") hereby submits comments on the Draft Protective Order. AirTouch submitted confidential data to the California Public Utilities Commission ("CPUC") in the California proceeding and has formally requested that any of this data now before the FCC be treated as confidential pursuant to the FCC's rules.[1]

As a threshold matter, consideration of a protective order is premature pending a ruling by the FCC regarding the CPUC's improper submission of confidential data. The FCC has before it a motion filed by the Cellular Carriers Association of California to strike the CPUC's confidential submission.[2] The FCC should rule on that motion prior to determining whether a protective

1 See "Opposition of AirTouch Communications to Request of The National Cellular Resellers Association for Access to California Petition for State Regulatory Authority Pursuant to the Terms of a Protective Order" at 1, dated September 29, 1994.

2 See "Motion of the Cellular Carriers Association of California to Reject Petition Or, Alternatively, Reject Redacted Information" dated September 19, 1994.

order is appropriate because granting that motion will render moot the need for any protective order. Additionally, the cellular carriers are not in a position to assess whether any protective order could adequately protect their interests because they do not know the exact contents of the competitively sensitive data that might be released to their direct competitors.

In any event, the imposition of a protective order will harm not only the cellular carriers, but the public as well. Most importantly, release of the information to competitors, even subject to a protective order, is contrary to the FCC's policy that disclosure of such information could be anticompetitive. As a practical matter, no protective order can protect adequately against inadvertent use of the confidential information by competitors.

Moreover, disclosure of the information to only certain parties would effectively create two records in this proceeding and deny the public its right to comment. As the CPUC itself has recognized "information must be made part of the record if the FCC intends to consider it in evaluating the CPUC petition."[3] Additionally, ordering release of the information, without adequate notice and agency review, would be unlawful and improper.

In light of the potential consequences of disclosure, the best course is for the FCC to strike the CPUC's improper confidential submission from the record. There is substantial publicly available data in the record upon which the FCC may rely in rendering a decision.

---

[3] "Emergency Motion to Compel Production to the California Public Utilities Commission of Information Contained In Oppositions to California's Petition to Retain State Regulatory Authority over Intrastate Cellular Service Rates" at 3, dated September 29, 1994.

I. THE USE OF A PROTECTIVE ORDER IN A PROCEEDING OF THIS NATURE WOULD BE UNPRECEDENTED.

In assessing the propriety of a protective order in this instance, the FCC must recognize the unusual procedural posture of this proceeding. The party who submitted the data with a request for confidentiality is not the party at risk should the data be disclosed. The CPUC cannot simply waive the cellular carriers' claims regarding the confidentiality of the data. Furthermore, despite the undisputedly sensitive nature of the information and the cellular carriers' lack of specific knowledge regarding the contents of the confidential submission, the carriers are being asked to allow their competitors to have access to such information. At this juncture, we can not adequately ascertain the consequences of such disclosure and therefore we can not submit to a protective order.

In order to meet its burden in this proceeding, the CPUC elected to ignore the public record in the California proceeding and instead decided to rely upon confidential data regarding rate plans and capacity utilization,[4] as well as information obtained from the California Attorney General. It chose this strategy despite the fact that the submission violates both state law[5] and the CPUC's own rules regarding disclosure of such information.[6] The redacted version of the CPUC's Petition distributed to the public omitted significant portions of the text and the support-

---

4 See "Administrative Law Judge's Ruling Directing Parties to Provide Supplemental Information" dated April 11, 1994, and "Administrative Law Judge's Ruling Directing Parties to Provide Further Supplemental Information" dated April 22, 1994.

5 The CPUC's disclosure to the FCC of confidential information which it received from the California Attorney General constitutes a potential criminal violation pursuant to California Government Code Section 11183.

6 Section 3.5 of CPUC General Order 66-C authorizes the Commission, a Commissioner or an Examiner in the course of a proceeding to disclose information that has been made confidential "upon a showing of good cause." The CPUC has made neither a showing nor a finding that "good cause" exists for disclosure of the confidential data.

ing appendices, and effectively denied the parties their "reasonable opportunity for public comment."[7]

A protective order will only exacerbate the prejudice to the cellular carriers and the public caused by the CPUC's confidential submission. It is the CPUC who chose to submit the confidential data. Yet it is the cellular carriers and the public who will be damaged by disclosure of the information to direct competitors. Nevertheless, the cellular carriers are now being asked to comment on the terms of a protective order without knowledge of the exact data that might be disclosed. Agreement under such circumstances cannot be deemed "informed consent" and thus any nondisclosure agreement would be null and void.

While the cellular carriers have not received notice of either the exact data that was submitted or the format in which it was submitted, it appears that highly sensitive competitive data would be disclosed to direct competitors in the event the cellular carriers enter into a protective order. As indicated in the Draft Protective Order, that information would include: market share data, capacity utilization figures, financial data per subscriber unit (including revenues, operating expenses and plant operating income), subscriber growth percentages, the number of customers per rate plan and commercially sensitive information obtained from the Attorney General.[8] The disclosure of such sensitive information to direct competitors would conflict with the FCC's recognition that even the disclosure of the limited pricing data contained in tariff filings could be anticompetitive.[9]

Requiring the use of a protective order under the circumstances in this proceeding would also be unprecedented. The FCC has generally only permitted the use of nondisclosure agreements in complaint, application and similar proceedings where there were a limited number

---

7 Section 332(c)(3)(A) and (B) of the Communications Act of 1934, as amended.

8 Draft Protective Order at ¶¶ 2(a)(b)(c)(d) and (e).

9 Second Report and Order, 9 FCC Rcd 1411, 1479-1480 (1994).

of parties who had to demonstrate standing in order to participate in the proceeding.[10] In contrast, in this proceeding the FCC risks broad dissemination of the sensitive data since any member of the public can request access. Additionally, in other instances in which the FCC has used a protective order, the party seeking action by the FCC submitted its own data, not that of third parties. AirTouch is unaware of any similar circumstances where the FCC has imposed the use of a protective order against a party unwilling to waive the claim of confidentiality of its commercially sensitive data.

10 See, e.g., In re Applications of Craig O. McCaw and AT&T, (FCC 94-238) at 87, adopted Sept. 19, 1994; released Sept. 19, 1994.

II. A PROTECTIVE ORDER CANNOT ADEQUATELY PROTECT THE PARTIES, WHILE PERMITTING PUBLIC COMMENT.

The FCC cannot fashion a protective order which will protect the cellular carriers from competitive harm while allowing the public its opportunity to comment. The sensitive nature of the information requires that it be protected from wide-spread publication. Yet the public nature of this proceeding would require the FCC to permit broad public access. There simply is no balance between these two interests.

The documents produced to the CPUC by AirTouch reveal sensitive market data regarding subscribers on each rate plan and cell site capacity utilization information. It was conclusively determined in the CPUC proceeding that disclosure of such information could place AirTouch at a serious competitive disadvantage, affecting its ability to compete in the market and producing imminent or direct harm of major consequence.[11] In accord with this finding, the CPUC recognizes that its Petition "contain[s] proprietary data and materials concerning commercially sensitive information not customarily released to the public which, if disclosed, could compromise the position of a cellular carrier relative to other carriers in offering service in various markets in California."[12]

The highly sensitive nature of the information is underscored by the restrictive conditions imposed on its release in the CPUC proceeding. The Administrative Law Judge in the CPUC proceeding ordered that access would be limited to parties to the proceeding only under certain narrow conditions. For example, access was to be afforded pursuant to a nondisclosure agreement and was limited to a "designated reviewing representative . . . who is not representing

---

11 See "Administrative Law Judge's Ruling Granting in Part Motions for Confidential Treatment of Data" dated July 19, 1994 and "Administrative Law Judge's Ruling Granting Motion for Modification of July 19, 1994 Ruling" dated August 8, 1994.

12 CPUC "Request for Proprietary Treatment of Documents Used in Support of Petition To Retain Regulatory Authority Over Interstate Cellular Service Rates" at 1-2, dated August 8, 1994.

or advising or otherwise assisting resellers in devising marketing plans to compete against cellular carriers."[13] The resellers did not obtain AirTouch's confidential data in that proceeding.

The protective order proposed in this proceeding does not even have such safeguards. For example, it would allow access to any employee of a competitor, regardless of whether or not that employee was also engaged in marketing or other business activities in which the information could be used.[14] No protective order can guard against the inadvertent use of the information by such an employee in other contexts. In fact, the FCC has recognized the problems inherent in the use of protective orders:

> Protection of commercially sensitive materials submitted by the parties pursuant to protective orders and confidentiality agreements is a very serious matter requiring vigilance by Commission staff as well as all parties gaining access to such information. Unauthorized disclosure of proprietary information could lead to substantial competitive and financial harm to the party submitting the information. Such disclosure could also undermine public confidence in the effectiveness and integrity of the Commission's processes, and have a chilling effect on the willingness of the parties to provide us with information needed to fulfill our regulatory duties.[15]

Additionally, under the terms of the Draft Protective Order, access would be granted on a "need to know" basis.[16] However, there is no guidance as to the level of proof required for such a showing. In fact, there has been no showing by the National Cellular Resellers Association ("NCRA"), or any other party, that access to the information is necessary in order to respond to

---

13 See "Administrative Law Judge's Ruling Granting in Part Motions for Confidential Treatment of Data" at 7, dated July 19, 1994.

14 Draft Protective Order at ¶ 3(b).

15 In Re Applications of Craig O. McCaw and AT&T, (FCC 94-238), adopted Sept. 19, 1994; released Sept. 19 1994 at 86 (footnote omitted). The FCC has observed that violations of protective orders may warrant sanctions under the Communications Act and the Commission's rules; however, the extent of the FCC's authority to sanction resellers or others who are not licensed by this Commission if they should violate the terms of a protective order is unclear. Ibid.

16 Draft Protective Order at ¶ 3(a).

the CPUC's Petition. NCRA cannot demonstrate that "the information is a necessary link in a chain of evidence that will resolve a public interest issue." In re Western Union Telegraph Company, 2 FCC Rcd 4485, 4487 (1987). Certainly other parties found the record sufficient to respond in a timely fashion.

In any event, the FCC cannot, in light of the public nature of this proceeding, impose safeguards allowing selected individuals access while denying such access to others. The Draft Protective Order essentially establishes two records for this proceeding, a confidential and complete record for some parties and an incomplete public record for everyone else.[17] Such an approach would undermine the "reasonable opportunity for public comment" required for this proceeding by the Communications Act.[18] "Even the possibility that there is here one administrative record for the public... and another for the Commission and those 'in the know' is intolerable." Home Box Office v. FCC, 567 F.2d 9, 54 (D.C. Cir. 1991).[19]

If the FCC intends to rely on the confidential data, it must undertake a complicated review process which will inevitably delay this proceeding. In the McCaw and AT&T transfer application proceeding, the FCC denied certain parties' requests for a waiver of the terms of the

---

17 The Draft Protective Order provides that the parties will submit the confidential and public portions of their briefs in separate filings. See Draft Protective Order at ¶ 7.

18 Section 332(c)(3)(A) and (B) of the Communications Act.

19 In Home Box Office, the Court of Appeals found that in establishing rules governing cable and subscription television broadcast, the Commission had relied upon substantial ex parte contacts by the parties, but failed to disclose the nature of those contacts to the public. The Court noted that:

> "The failure of the public record in this proceeding to disclose all of the information made available to the Commission is not the only inadequacy we find here. Even if the Commission had disclosed to this court the substance of what was said to it ex parte, it would still be difficult to judge the truth of what the Commission asserted it knew about the television industry because we would not have the benefit of adversarial discussion among the parties. The importance of such discussion to the proper function of agency decision making and judicial review process is evident in our cases (footnote omitted)." 567 F.2d at 55.

protective order to allow them to submit information to the MFJ court. The FCC observed that "a waiver should be granted only in extraordinary circumstances when a compelling public interest has been demonstrated."[20] The FCC noted that had McCaw and AT&T not agreed to the protective order, the FCC:

> then would be required to weigh the competitive significance of each document * * * and determine in each instance, whether the public interest in disclosure outweighed [the submitters] legitimate interests in protecting their private business data. This massive undertaking and the inevitable disputes over our determinations, would have precluded disclosure in any reasonable time frame.[21]

In this proceeding the parties have not agreed to the terms of a protective order. Thus, if the FCC intends to rely upon the CPUC's improper confidential submission it must proceed with the cumbersome procedures discussed above. AirTouch urges the FCC to examine the evidence that is already in the public record in this proceeding. That evidence is sufficient to allow the FCC to render a decision on the CPUC's Petition. The FCC need not resort to reliance on an improper confidential submission which will subject its ultimate decision in this proceeding to attack as arbitrary.

---

20 In re Applications of Craig O. McCaw and AT&T, (FCC 94-238), adopted Sept. 19, 1994; released Sept. 19, 1994 at 87.

21 Id. at 87.

III. DISCLOSURE OF THE INFORMATION WITHOUT PROPER NOTICE AND REVIEW WOULD BE UNLAWFUL AND AN ABUSE OF AGENCY DISCRETION.

The FCC cannot simply order that the confidential data be disclosed, even subject to a protective order. Disclosure of the confidential information under such circumstances would be unlawful under the Federal Trade Secrets Act, 18 U.S.C. § 1905 (the "Act"). Pursuant to Executive Order No. 12600, 52 Red. Reg. 23781 (June 23, 1987), the FCC must notify any person who has submitted confidential commercial information that such information may be disclosed. The FCC must also give the submitter an opportunity to object to the disclosure, and give careful consideration to those objections. Thus, the FCC must specify for AirTouch the information that may be disclosed and give AirTouch the opportunity to object specifically regarding such information prior to disclosure.

Release of the information, which falls within Exemption 4 of the Freedom of Information Act, 5 U.S.C. § 552(b)(4), would also constitute a serious abuse of agency discretion redressable through a "reverse" FOIA suit.[22] Exemption 4 protects "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential." 5 U.S.C. § 552(b)(4). AirTouch's data constitutes confidential commercial and financial information (and possibly trade secrets)[23] which requires that AirTouch be afforded adequate notice in order to preserve the confidentiality of the information.[24]

---

[22] National Org. for Women v. Social Sec. Admin., 736 F.2d 727, 743 (D.C. Cir. 1984) (Robinson, J., concurring); accord Pacific Architects & Eng'rs v. Department of State, 906 F.2d 1345, 1347 (9th Cir. 1990). A "reverse" FOIA suit is an action in which an originator of information seeks under the Administrative Procedure Act to prevent an agency from releasing that information to a third party. See Chrysler Corp. v. Brown, 441 U.S. 281, 292-317 (1979).

[23] See e.g., "Administrative Law Judge's Ruling Denying Motion for Public Disclosure of Data," dated September 14, 1994, finding that a study submitted by The Cellular Carrier's Association of California regarding the carriers' rate plans constitutes a trade secret.

[24] See "Opposition of AirTouch Communications to Request of the National Cellular Resellers Association for Access to California Petition for State Regulatory Authority Pursuant to the Terms of a Protective Order" at 7-8, dated September 29, 1994.

IV. CONCLUSION.

For the foregoing reasons, AirTouch Communications respectfully requests that the FCC strike the CPUC's confidential data from the record in this proceeding. In light of the abundant public evidence, reliance on the confidential information is simply not necessary.

Dated: October 7, 1994.

AIRTOUCH COMMUNICATIONS
David A. Gross
Kathleen Q. Abernathy
Suite 800
1818 N Street, N.W.
Washington, D.C. 20036
(202) 293-3800

PILLSBURY MADISON & SUTRO
Mary B. Cranston
Megan Waters Pierson
P.O. Box 7880
San Francisco, CA 94120-7880
(415) 983-1000

By _____
David A. Gross
Attorneys for AirTouch Communications

CERTIFICATE OF SERVICE

I, Tina L. Murray, do hereby certify that copies of the foregoing "Comments of AirTouch Communications on the Draft Protective Order", were sent via first class mail, postage prepaid, on this 7th day of October, 1994 to the following parties.

Ellen S. LeVine
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102

Joel H. Levy
Cohn and Marks
Suite 600
1333 New Hampshire Ave., NW
Washington, DC 20036

Adam Anderson, Esq.
Bay Area Cellular Telephone Co.
651 Gateway Boulevard, Ste. 1500
South San Francisco, CA 94080

Leonard J. Kennedy
Dow, Lohnes & Albertson
1255 23rd Street, N.W.
Washington, D.C. 20037

Michael Shames
1717 Kettner Blvd., Suite 105
San Diego, CA 92101

Howard J. Symons
Mintz, Levin, Cohn, Ferris Glovsky
and Popeo, P.C., Suite 900
701 Pennsylvania Ave., N.W.
Washington, D.C. 20004

James M. Tobin
Morrison & Foerster
345 California Street
San Francisco, CA 94104-2576

Mark J. Golden
Personal Comms Industry Assn
1019 Nineteenth Street, N.W.
Suite 1100
Washington, D.C. 20036

Russell Fox
Gardner, Carton Douglas
1301 K Street, N.W.
Suite 900, East Tower
Washington, D.C. 20005

Judith St. Ledger-Roty
Reed Smith Shaw & McClay
1200 18th Street, N.W.
Washington, D.C. 20036

Peter A. Casciato
A Professional Corporation
Suite 701
8 California Street
San Francisco, CA 94111

Lewis J. Paper
Keck, Mahin & Cate
1201 New York Avenue, N.W.
Washington, D.C. 20005

David A. Simpson
Young, Vogl, Harlick & Wilson
425 California Street, Suite 2500
San Francisco, CA 94104

Michael B. Day
Wright & Talisman, P.C.
100 Bush Street
Suite 225
San Francisco, CA 94104

Scott K. Morris
McCaw Cellular Communications
5400 Carillon Point
Kirkland, WA 98033

Thomas H. Bugbee
County of Los Angeles
Telecomms Branch, P.O. Box 2231
Downey, CA 90242

Jeffrey Bork
US West Cellular of California, Inc.
1801 California Street, Suite 5100
Denver, CO 80202

Regina Harrison
Federal Communications Commission
2025 M Street, N.W., Room 5002
Washington, D.C. 20554

Thomas Gutierrez
Lukas, McGowan, Nace & Gutierrez
1111 Nineteenth Street, N.W.
Suite 1200
Washington, D.C. 20036

Alan Shark
American Mobile Telecomms Assn, Inc.
1150 19th Street, N.W., Suite 250
Washington, D.C. 20036

Richard Hansen
Cellular Agents Trade Association
11268 Washington Boulevard
Suite 201
Culver City, CA 90230

Michael Altschul
Cellular Telecommunications Industry
Association
1250 Connecticut Ave., N.W., Suite 200
Washington, D.C. 20036

Russell Fox
Gardner, Carton & Douglas
1301 K Street, N.W.
Suite 900, East Tower
Washington, D.C. 20005

Richard McKenna
GTE Service Corporation
600 Irving Ridge
HQEO3J36
Irving, TX 75015-6363

Sharon Diskin
Federal Communications Commission
1919 M Street, N.W., Room 623
Washington, D.C. 20554

Kelly Cameron
Federal Communications Commission
2025 M Street, N.W., Room 5002
Washington, D.C. 20554

William Kennard
Federal Communications Commission
1919 M Street, N.W., Room 614-B
Washington, D.C. 20554

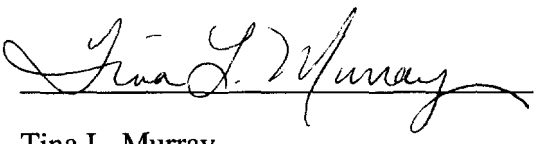
Gina Keeney
Federal Communications Commission
2025 M Street, N.W., Room 5002
Washington, D.C. 20554

Commissioner Quello
Federal Communications Commission
1919 M Street, N.W., Room 802
Washington, D.C. 20554

Commissioner Barrett
Federal Communications Commission
1919 M Street, N.W., Room 826
Washington, D.C. 20554

Commissioner Ness
Federal Communications Commission
1919 M Street, N.W., Room 832
Washington, D.C. 20554

Commissioner Chong
Federal Communications Commission
1919 M Street, N.W., Room 844
Washington, D.C. 20554



Tina L. Murray